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THE POLITICS OF POSTMODERN JURISPRUDENCE

Stephen M. Feldman*

For me the world has always been more of a puppet show. But when one looks behind the curtain and traces the strings upward he finds they terminate in the hands of yet other puppets, themselves with their own strings which trace upward in turn, and so on. In my own life I saw these strings whose origins were endless enact the deaths of great men in violence and madness.¹

— Cormac McCarthy

What is the politics of postmodern jurisprudence? Forms of postmodern interpretivism, including philosophical hermeneutics² and deconstruction,³ assert that we are always and already interpreting. This

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1. CORMAC MCCARTHY, *ALL THE PRETTY HORSES* 231 (1992).

2. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., Crossroad Publishing Corp. 2d rev. ed. 1989) (1960) [hereinafter GADAMER, *TRUTH AND METHOD*]. The leading analyses of Gadamer's work are GEORGIA WARNKE, *GADAMER: HERMENEUTICS, TRADITION AND REASON* (1987) and JOEL C. WEINSHEIMER, *GADAMER'S HERMENEUTICS: A READING OF Truth and Method* (1985).

3. See JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1976) (1967) [hereinafter DERRIDA, *GRAMMATOLOGY*]; JACQUES DERRIDA, *POSITIONS* (Alan Bass trans., Univ. of Chi. Press 1981) (1972) [hereinafter DERRIDA, *POSITIONS*]; JACQUES DERRIDA, *Cogito and the History of Madness*, in *WRITING AND DIFFERENCE* 31 (Alan Bass trans., Univ. of Chi. Press 1978) (1967); JACQUES DERRIDA, *Différance*, in *MARGINS OF PHILOSOPHY* 1 (Alan Bass trans., Univ. of Chi. Press 1982) [hereinafter DERRIDA, *Différance*]; JACQUES DERRIDA, *The Ends of Man*, in *MARGINS OF PHILOSOPHY*, *supra*, at 109; JACQUES DERRIDA, *From "Plato's Pharmacy,"* in *DISSEMINATION*, reprinted in *A DERRIDA READER* 112 (Peggy Kamuf ed., 1991) [hereinafter DERRIDA, *Plato*]; JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE*, *supra*, at 278 [hereinafter DERRIDA, *Structure*]; Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 *CARDOZO L. REV.* 919 (Mary Quaintance trans., 1990) [hereinafter Derrida, *Law*]. For excellent discussions of deconstruction, see JONATHAN CULLER, *ON DECONSTRUCTION* (1982); CHRISTOPHER NORRIS, DERRIDA (1987); David Hoy, *Jacques Derrida*, in *THE RETURN OF GRAND THEORY IN THE HUMAN SCIENCES* 41 (Quentin Skinner ed., 1985). For an interesting comparison of Derrida and Gadamer, see G.B. MADISON, *Beyond Se-*

assertion has provoked numerous scholarly attacks, many of which invoke standard modernist hobgoblins such as textual indeterminacy, solipsism, ethical relativism, and nihilism.⁴ From the modernist standpoint, postmodern jurisprudence thus is either conservative or apolitical because it lacks the firm foundations necessary for knowledge and critique. In this article, I argue that these modernist attacks not only are mistaken but that they also obscure the potentially radical political ramifications of postmodern interpretivism.⁵

My discussion focuses on two recent and seemingly opposed articles: Dennis Patterson's *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*⁶ and J.M. Balkin's *Transcend-*

riousness and Frivolity: A Gadamerian Response to Deconstruction, in THE HERMENEUTICS OF POSTMODERNITY 106 (1988) (favoring the Gadamerian viewpoint).

4. For one recent attack on Derridean deconstruction as nihilistic and relativistic, see Martha C. Nussbaum, *Skepticism About Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 716, 724-25 (1994).

5. For further essays in which I discuss postmodernism, including postmodern interpretivism, see Stephen M. Feldman, *From Modernism to Postmodernism in American Legal Thought: The Significance of the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* (Bernard Schwartz ed., forthcoming 1996); Stephen M. Feldman, *Diagnosing Power: Postmodernism in Legal Scholarship and Judicial Practice (with an Emphasis on the Teague Rule Against New Rules in Habeas Corpus Cases)*, 88 NW. U. L. REV. 1046 (1994) [hereinafter Feldman, *Diagnosing Power*]; Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661 (1991) [hereinafter Feldman, *New Metaphysics*]; Stephen M. Feldman, *Exposing Sunstein's Naked Preferences*, 1989 DUKE L.J. 1335 [hereinafter Feldman, *Exposing*]; Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 GEO. L.J. 2243 (1993) [hereinafter Feldman, *The Persistence of Power*]; Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679 [hereinafter Feldman, *Republican Revival/Interpretive Turn*]. I also use a postmodern approach to analyze the relations between power and the constitutional doctrine of separation of church and state in a forthcoming book: STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* (forthcoming 1996).

I rely heavily on the following books and essays that focus on postmodernism: ZYGMUNT BAUMAN, *INTIMATIONS OF POSTMODERNITY* (1992) [hereinafter BAUMAN, *INTIMATIONS*]; STEVEN CONNOR, *POSTMODERNIST CULTURE* (1989); DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* (1989); FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979); CHRISTOPHER NORRIS, *WHAT'S WRONG WITH POSTMODERNISM* (1990); *FEMINISM/POSTMODERNISM* (Linda J. Nicholson ed., 1990); Roy Boyne & Ali Rattansi, *The Theory and Politics of Postmodernism: By Way of an Introduction*, in *POSTMODERNISM AND SOCIETY* 1 (Roy Boyne & Ali Rattansi eds., 1990); Stephen Crook, *The End of Radical Social Theory? Notes on Radicalism, Modernism and Postmodernism*, in *POSTMODERNISM AND SOCIETY*, *supra*, at 46.

6. Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEXAS L. REV. 1 (1993).

dental Deconstruction, *Transcendent Justice*.⁷ Patterson directly assails postmodern interpretivism, which he refers to as "interpretive universalism"⁸ and "hermeneutic holism."⁹ According to Patterson, we must reject interpretivism because it necessarily leads to an infinite regress of interpretations: interpretivism sends us reeling into an abyss where we can never grasp the meaning of a text because it constantly slips away into another interpretation, another meaning — and another, and another, and another. In contrast to Patterson, Balkin identifies himself as a deconstructionist — a type of postmodern interpretivist — and in fact, Balkin's article can be read as an effort to respond to Patterson's concerns. Balkin acknowledges and directly confronts the potential nihilism of deconstruction, and in doing so searches for a source of human values. Specifically, Balkin attempts to identify the source of the human desire or drive for justice. He concludes that "transcendent values," including justice, arise from "the wellsprings of the human soul," which transcend "the creations of culture."¹⁰

I shall argue that both Patterson and Balkin are wrong. Patterson mischaracterizes postmodern interpretivism. It does not lead to an infinite regress of interpretations that undermines meaning, but rather, to the contrary, interpretivism explains how meaning and understanding are possible in the first place. We experience a meaningful being-in-the-world because we are always and already interpreting. Meanwhile, Balkin errs by concluding that postmodern interpretivism, in the guise of deconstruction, needs to be augmented in order to explain the human desire for justice. Balkin underestimates the significant social and political implications of deconstruction: deconstruction itself can explain how humans constantly quest after justice but never attain it. In short, the reality of postmodern interpretivism — the way of our being-in-the-world — responds to both Patterson and Balkin. Interpretivism explains how we come to understand a text, and simultaneously, how we have an inexhaustible urge for justice.

Part I of this article describes and critiques Patterson's argument against postmodern interpretivism and explores the relation between understanding and interpretation.¹¹ In his article, Patterson focuses on

7. J.M. Balkin, *Transcendental Deconstruction, Transcendent Justice*, 92 MICH. L. REV. 1131 (1994).

8. See Patterson, *supra* note 6, at 3.

9. See Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 314 (1992) [hereinafter Patterson, *Postmodernism*]. Patterson reiterates his criticisms of interpretivism in his recently published book, DENNIS PATTERSON, *LAW AND TRUTH* 71-127 (1996).

10. Balkin, *supra* note 7, at 1139.

11. See *infra* Part I.

Ronald Dworkin and Stanley Fish as "two exemplary proponents"¹² of interpretivism.¹³ I do not attempt to defend either Dworkin or Fish; in fact, Fish already has defended himself.¹⁴ Fish's defense, however, revolved around his persuasive demonstration that Patterson had misread Fish's corpus.¹⁵ Fish did not attempt to address the central questions raised by Patterson: how does one come to understand a legal text, and how are understanding and interpretation related?¹⁶ In critiquing Patterson's position, Part I explores the importance of philosophical hermeneutics to the resolution of these questions. Part II focuses on postmodern interpretivism and justice by first examining the relationship between philosophical hermeneutics and deconstruction and then critiquing Balkin's argument connecting justice and transcendental deconstruction. Part II concludes by discussing how philosophical hermeneutics helps us to understand the meaning of justice and how deconstruction feeds our inexhaustible urge for justice.¹⁷ Parts I and II are tied together by their overlapping discussions of the political ramifications of postmodern jurisprudence.

I. ON THE RELATION BETWEEN UNDERSTANDING AND INTERPRETATION

A. *The Attack on Postmodern Interpretivism*

How does one come to understand a legal text — or any other text, for that matter? Because Patterson believes postmodern interpretivism

12. Patterson, *supra* note 6, at 3.

13. Patterson views Dworkin and Fish as being "united at the deepest level of philosophical conviction." *Id.* at 6; see also Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 279-93 (1993) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991)) (attacking both Dworkin and Fish). See generally RONALD DWORKIN, *LAW'S EMPIRE* (1986); STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989); Stanley Fish, *Working on the Chain Gang: Interpretation in the Law and in Literary Criticism*, in *THE POLITICS OF INTERPRETATION* 271 (W.J.T. Mitchell ed., 1983). To me, however, Fish's criticisms of Dworkin can be summarized in the statement that Dworkin is not interpretive enough. I tend to find Fish's position much stronger than Dworkin's.

14. See Stanley Fish, *How Come You Do Me Like You Do? A Response to Dennis Patterson*, 72 TEXAS L. REV. 57 (1993).

15. See *id.*; see also Steven L. Winter, *One Size Fits All*, 72 TEXAS L. REV. 1857, 1861 (1994) (calling Patterson's misreading of Fish "monstrous"). I agree with Fish's assessment of Patterson's argument.

16. Fish notes that he and Patterson use the word "interpretation" differently. Nonetheless, Fish fails to pursue this important point by asking how we should use the word, or whether it matters how we use it. See Fish, *supra* note 14, at 64. For Patterson's reply to Fish, see Dennis Patterson, *You Made Me Do It: My Reply to Stanley Fish*, 72 TEXAS L. REV. 67 (1993).

17. See *infra* Part II.

errs in response to this vital question, he focuses his assault on this issue. He launches his attack fairly enough by accurately presenting a basic tenet of postmodern interpretivism: "our fundamental mode of being-in-the-world is interpretive."¹⁸ His very next sentences, however, demonstrate that he misconstrues the deep ontological significance of this insight. He states: "To be is to be the bearer of an interpretive grid. One comes to have a world by virtue of one's possession of an interpretive template laid against the external world, and the external world is then rendered intelligible."¹⁹ Thus, Patterson mistakenly construes interpretivism in modernist instead of postmodernist terms: he sharply separates the individual interpreter from an external world. The interpreter seemingly *possesses* an interpretive template that she invokes to render the alienated external world understandable. Patterson's rendition of interpretivism suggests a near-blind person (the interpreter) who gropes about in a house (the external world) until she fortunately finds a pair of glasses (the template). Suddenly, she can see — that is, understand the world. In Patterson's words, interpretivists argue that texts can be understood only "through some lens."²⁰ Indeed, Patterson suggests that interpretivists believe that one can readily exchange one kind or shade of glasses for another — say, green-tinted for rose-colored.

Because Patterson construes interpretivism in modernist terms, his vision of the hermeneutic act is radically disjointed: interpretation is a process that mediates between understanding and text. Patterson writes: "[T]he act of interpretation is interposed between the utterance and our grasp of its meaning. Interpretation is an act of mediation: Done correctly, it results in the apprehension of meaning. Done poorly, comprehension eludes us."²¹ Thus, when postmodern interpretivists claim that we are always and already interpreting, Patterson jumps up and exclaims, "Impossible!" To Patterson, postmodern interpretivism mistakenly sends the interpreter spinning into an infinite progression of inter-

18. Patterson, *supra* note 6, at 48. For example, Francis J. Mootz writes: "If a core theoretical premise of contemporary hermeneutics exists, it is the universality of the hermeneutical situation." Francis J. Mootz III, *The New Legal Hermeneutics*, 47 VAND. L. REV. 115, 126 (1994) (reviewing LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE (Gregory Leyh ed., 1992)).

19. Patterson, *supra* note 6, at 48.

20. Dennis Patterson, *Wittgenstein and Constitutional Theory*, 72 TEXAS L. REV. 1837, 1846 (1994).

21. Patterson, *supra* note 6, at 20.

pretations, an endless series of mediating acts. The interpreter thus never quite grasps the meaning of the text.²²

With textual indeterminacy gathering around our feet, Patterson predictably declares that the mud and muck of relativism and solipsism are about to gush forth into a life-threatening onslaught:

Because interpretations or perspectives can and do differ, there may in principle be no way to choose between competing interpretations. The slide to relativism is swift and sure, for there is no stopping the infinite regress of interpretation. Every perspective begets another and so on and so on. In the end, it seems, all we have are our own perceptions.²³

Because of this impending solipsism and relativism, Patterson solemnly pronounces that postmodern interpretivism threatens to wash away the ground needed for social critique or critical theory: "Deconstruction, and other versions of 'hermeneutic holism,' give us no place to start [a critique]. Every place is as good as any other, so no particular set of terms can be taken as the appropriate place to begin."²⁴ Postmodern interpretivism, in the end, generates political conservatism.

What can save us from this interpretive slide to abysmal quietude? Patterson's answer, of course, is Wittgensteinian pragmatism.²⁵ Patterson proclaims that "[t]he only way out of this vicious regress [of postmodern interpretivism] is to recognize that the normativity of rule-guided behavior (*e.g.*, law) lies not in the act of the individual (*e.g.*, interpretation) but in a practice."²⁶ The essential practice that saves us from the disaster of interpretivism is understanding. Understanding, in turn, is knowing how to participate in a practice: "[W]e have a world in concert with others because we understand the manifold activities that constitute that world. Catching on to and participating in these activities — knowing *how* to act — is the essence of understanding."²⁷

Most important to Patterson, we must sharply distinguish understanding from interpretation. Understanding is "primordial,"²⁸ while in-

22. Patterson writes: "If all understanding were interpretation, then each interpretation would itself stand in need of interpretation, and so on, infinitely regressing to infinity." *Id.* at 21.

23. *Id.* at 4 (footnotes omitted).

24. Patterson, *Postmodernism*, *supra* note 9, at 314 (footnotes omitted).

25. It is worth noting that some other commentators, contrary to Patterson, view Wittgenstein himself more as a postmodern interpretivist. *See, e.g.*, SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989).

26. Patterson, *supra* note 6, at 21.

27. *Id.* at 55.

28. *Id.*

interpretation is secondary.²⁹ Understanding stands as “unreflective linguistic practice,”³⁰ whereas interpretation involves one’s deliberate reflection about the meaning of a text. Interpretation, therefore, emerges as a “second-order, reflective enterprise”³¹ that we engage in only if we fail to understand a text immediately because its meaning is ambiguous or otherwise unclear.³² Patterson argues:

The criterion for understanding an utterance is not engagement of a process; rather, it is acting appropriately in response to the utterance. For example, one evinces understanding of the request “Please pass the salt” by passing the salt or by explaining why it is impossible to do so. Understanding is made manifest in the *act* of passing the salt, and the act is a criterion for having understood the utterance. Understanding is acting properly in response to the request. If the request is vague or otherwise opaque, interpretation of the request may be necessary, otherwise not.

[Thus] interpretation is best thought of as an activity we engage in when our understanding of an utterance is somehow in question (*e.g.*, a request to pass the salt when the salt is directly in front of the person making the request). Interpretation is an activity of clarification — we take the utterance in question and appraise competing construals or interpretations of it in an effort to clarify its meaning.³³

In short, the very act of interpretation depends upon the practice of understanding “already being in place.”³⁴ Understanding halts the infinite regress of interpretation by allowing us to grasp the meaning of a text instead of spinning wildly from one interpretation to another *ad infinitum*. Understanding appears as the talisman that saves us from textual indeterminacy, solipsism, relativism, and nihilism. Thus, Patterson concludes, postmodern interpretivists crucially fail to recognize that

29. Other Wittgensteinian pragmatists have argued in favor of this same distinction between understanding and interpretation. See Richard Shusterman, *Beneath Interpretation: Against Hermeneutic Holism*, 73 *MONIST* 181 (1990); James Tully, *Wittgenstein and Political Philosophy*, 17 *POL. THEORY* 172 (1989).

30. Patterson, *supra* note 6, at 54.

31. Patterson, *Postmodernism*, *supra* note 9, at 312.

32. See Patterson, *supra* note 6, at 54-55. Shusterman writes:

[T]hough all understanding is selective, not all selective understanding is interpretive. If understanding’s selection is neither conscious nor deliberate but pre-reflective and immediate, we have no reason to regard that selection or the resultant understanding as interpretation; since interpretation standardly implies some deliberate or at least conscious thinking, while understanding does not.

Shusterman, *supra* note 29, at 190.

33. Patterson, *supra* note 6, at 20-21 (footnotes omitted).

34. *Id.* at 55. Shusterman observes that understanding gives a “meaning-giving ground” on which to base interpretation. Shusterman, *supra* note 29, at 195.

"[w]ithout understanding, interpretation would simply bite on air."³⁵ The central interpretivist claim, that we are always and already interpreting, must be wrong because understanding stands prior to and separate from interpretation.

Of course, Patterson's conclusion hardly seems surprising since he ends exactly where he began — his conclusion merely reiterates his premises. Patterson's argument can be summarized as follows: first, interpretivists declare that everything is interpretation; second, interpretivists describe interpretation as a mediating act that stands apart from other activities; and third, interpretivism represents confused thinking. If, as Patterson suggests, some activities clearly are not interpretive — because interpretation stands apart as a distinct mediating act — then interpretivists have constructed an analytically imprecise argument. Yet, Patterson fails to consider the possibility that his *own mischaracterization* of interpretivism — rather than interpretivism itself — produces the apparent confusion within the interpretivist position.

B. *Philosophical Hermeneutics*

Patterson's *modernist* portrayal of interpretivism moots his entire argument. His attack on interpretivism may be somewhat interesting, but it has nothing to do with *postmodern* interpretivism. The philosophical hermeneutics of Hans-Georg Gadamer illustrates this point.³⁶ To read Gadamer as undermining understanding resembles reading Thomas Kuhn as undermining science: it is to skew the fundamental message. Just as Kuhn explains how scientists approach and understand their endeavors,³⁷ Gadamer explains how we approach and come to understand

35. Patterson, *Postmodernism*, *supra* note 9, at 313. James Tully argues that interpretation, unlike understanding, never arrives at a practical use — it never reaches the stage of application. See Tully, *supra* note 29, at 194-95.

36. To some extent, my criticism of Patterson arises from his failure to discuss Gadamer. Yet, Patterson claims to attack interpretive universalism, not just Dworkin and Fish, upon whom Patterson focuses. Furthermore, my desire to focus on Gadamer is not so unusual as to be unfair or uncharitable to Patterson. To the contrary, more and more legal scholars have begun to rely explicitly upon Gadamer. See, e.g., J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993) [hereinafter Balkin, *Understanding*]; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); Feldman, *New Metaphysics*, *supra* note 5; David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985); Francis J. Mootz, III, *Is the Rule of Law Possible in a Postmodern World?*, 68 WASH. L. REV. 249 (1993); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

37. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

a text (or text-analogue).³⁸ Indeed, from one perspective, "philosophical hermeneutics is an attempt to identify the irreducible conditions of human understanding."³⁹

Gadamer maintains that an interpreter or reader is always situated in a communal "tradition"⁴⁰ that inculcates the individual with prejudices and interests. Those prejudices and interests necessarily guide and limit understanding and communication.⁴¹ That is, communal tradition and individual prejudices and interests constrain what one can possibly understand or see in a text. As Gadamer says, the traditions of one's community help to shape the interpreter's "horizon:" "the range of vision that includes everything that can be seen from a particular vantage point."⁴² Furthermore, tradition is not a thing of the past.

38. A text-analogue is any meaningful thing, event, or action that can be understood or read as if it were a text. See CLIFFORD GEERTZ, *Deep Play: Notes on the Balinese Cockfight*, in *THE INTERPRETATION OF CULTURES* 412, 448-49 (1973); Paul Ricoeur, *The Model of the Text: Meaningful Action Considered as a Text*, in *INTERPRETIVE SOCIAL SCIENCE — A READER* 73, 81 (Paul Rabinow & William M. Sullivan eds., 1979). Gadamer himself has linked his philosophical hermeneutics to a Kuhnian approach to science. See HANS-GEORG GADAMER, *On the Origins of Philosophical Hermeneutics*, in *PHILOSOPHICAL APPRENTICESHIPS* 177, 179 (Robert R. Sullivan trans., 1985).

39. Gregory Leyh, *Introduction to LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE* xi, xii (Gregory Leyh ed., 1992).

40. See GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 282-84. In a similar vein, Stanley Fish talks of the "interpretive community." See STANLEY FISH, *Is There a Text in This Class?*, in *IS THERE A TEXT IN THIS CLASS?* 303, 303-04 (1980); Stanley Fish, *Change*, 86 S. ATLANTIC Q. 423, 423-24 (1987) [hereinafter Fish, *Change*].

41. The concept of prejudices comes specifically from Gadamer, while the concept of interests is derived from Jürgen Habermas. See, e.g., Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem* (David E. Linge trans.), reprinted in JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS* 128, 133 (1980) [hereinafter Gadamer, *The Universality*]. Habermas, in his early theory, argued that knowledge is possible only because of human "interests." Habermas delineated only three "knowledge-constitutive interests" — an interest in prediction and control, an interest in understanding of meaning, and an interest in emancipation. See JÜRGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (Jeremy J. Shapiro trans., Beacon Press 1971) (1968). I am, therefore, using the concept of human interests in a much broader manner so that it resonates with Gadamer's concept of prejudices. See also Stanley Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773, 1795 (1987) (contending that "already-in-place interpretive constructs are a condition of consciousness").

42. GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 302; see *id.* at 306. Steven Connor writes:

In trying to understand our contemporary selves in the moment of the present, there are no safely-detached observation-posts, not in 'science', 'religion', or even in 'history'. We are in and of the moment that we are attempting to analyze, in and of the structures we employ to analyze it. One might almost say that this terminal self-consciousness . . . is what characterizes our contemporary or 'postmodern' moment.

Rather it is something in which we constantly participate. We are historical beings who *live* in tradition, just as we live in a community: "[W]e are always situated within traditions . . . [which are] always part of us."⁴³ We cannot escape or completely set aside tradition, prejudices, and interests, yet at the same time, Gadamer maintains that "tradition does not persist because of the inertia of what once existed. It needs to be affirmed, embraced, cultivated."⁴⁴

Significantly, although communal traditions and the concomitant prejudices and interests constrain our possibilities for understanding and communication, they simultaneously enable or empower us to communicate and to understand. Whereas Patterson insists that understanding stands prior to interpretation, Gadamer reasons that understanding makes sense only within the hermeneutic or interpretive process. Our traditions, prejudices, and interests actually open us to meaning, understanding, and truth by generating and shaping our expectations for a text: "the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world."⁴⁵ The hermeneutic act — including understanding, interpretation, and application — occurs only because we already have cultivated prejudices and interests by participating in communal traditions.⁴⁶ Without our prejudices and interests, we would have no direction; the notion of understanding would be nonsensical. Gadamer states that "belonging to a tradition is a condition of hermeneutics,"⁴⁷ or in other words, tradition "makes understanding possible."⁴⁸

When we turn to a text, we anticipate or assume its completeness: we assume that it can communicate some "unity of meaning."⁴⁹ Interpretation thus requires us to confront the text as we search for its meaning. The quest for meaning begins with our "fore-understanding" of the

CONNOR, *supra* note 5, at 5.

43. GADAMER, TRUTH AND METHOD, *supra* note 2, at 282.

44. *Id.* at 281.

45. Gadamer, *The Universality*, *supra* note 41, at 133.

46. A Wittgensteinian perspective echoes philosophical hermeneutics on this point.

Gene Anne Smith writes:

[L]anguage is a practice, a technique, that we learn. It depends upon a *given* community of understanding and established practices, to be sure. But this is required not in order to *verify* my judgments. It is required to give the context in which I can make meaningful judgments at all.

Gene Anne Smith, *Wittgenstein and the Sceptical Fallacy*, in WITTGENSTEIN AND LEGAL THEORY 157, 179 (Dennis M. Patterson ed., 1992) (footnote omitted).

47. GADAMER, TRUTH AND METHOD, *supra* note 2, at 291.

48. *Id.* at 329.

49. *See id.* at 293-94.

text — a fore-understanding generated from our prejudices and interests.⁵⁰ This fore-understanding, however, is constantly adjusted as we question the text, as we penetrate further and further into its meaning;⁵¹ we are “ceaselessly forming a new preunderstanding.”⁵² Through an interactive process consisting of understanding, questions, adjustments, further questions, and so forth, the ultimate meaning of the text dialectically “comes into being.”⁵³ In this sense, then, interpretation resembles a conversation or dialogue between the interpreter and the text. Hence, while one anticipates or fore-understands a particular meaning for a text at the outset of interpretation, the dialogical process of hermeneutics can lead one to arrive eventually at a different meaning. Regardless, throughout this hermeneutic process, the interpreter continues to assume that the text is intelligible, that it has a unity of meaning, although in some instances an interpreter might finally conclude otherwise.

The metaphor of the hermeneutic circle elucidates the dialogical nature of interpretation. Gadamer first presents the hermeneutic circle in its simplest form: “It concerns the circular relation between the whole [of a text] and its parts: the anticipated meaning of a whole is understood through the parts, but it is in light of the whole that the parts take on their illuminating function.”⁵⁴ Gadamer, however, elaborates the hermeneutic circle by accounting for the interrelations between interpreter, text, and tradition. According to Gadamer:

[The hermeneutic circle] is not formal in nature. It is neither subjective nor objective, but describes understanding as the interplay of the movement of tradition and the movement of the interpreter. The anticipation of meaning that governs our understanding of a text is not an act of subjectivity, but proceeds from the commonality that binds us to the tradition. But this commonality is constantly being formed in our relation to tradition. Tradition is not simply a permanent precondition; rather, we produce it ourselves inasmuch as we understand, participate in the evolution of tradition, and hence further determine it ourselves. Thus the circle of understanding is not a “methodological” circle, but describes an element of the ontological structure of understanding.⁵⁵

50. See *id.* at 332.

51. See *id.* at 267.

52. HANS-GEORG GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in *PHILOSOPHICAL HERMENEUTICS* 18, 38 (David E. Linge ed. & trans., 1976).

53. GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 462; see *id.* at 101-69.

54. Hans-Georg Gadamer, *The Problem of Historical Consciousness*, in *INTERPRETIVE SOCIAL SCIENCE — A READER*, *supra* note 38, at 103, 146.

55. GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 293. Elsewhere, I have described the Gadamerian hermeneutic circle as follows:

In this reconceptualized hermeneutic circle, the meaning of a text comes into being.⁵⁶

Most important, in contrast to Patterson's Wittgensteinian approach, Gadamer emphasizes the *unity* of the hermeneutic act. Whereas Patterson insists that understanding and interpretation must be distinguished sharply, Gadamer maintains that the hermeneutic event is "one unified process."⁵⁷ To Gadamer, understanding, interpretation, and application are not distinct events, but rather they constitute the components of a unified hermeneutic act.⁵⁸ We understand (or fore-understand) a text only insofar as we open to its meaning because of our prejudices derived from communal traditions; we develop prejudices only as we simultaneously accept and reconstruct — or interpret — communal traditions; and we understand and interpret texts as well as traditions only insofar as we apply them to practical problems within our current horizon. We cannot extract any one component of this hermeneutic process, such as understanding, and treat it as a primordial, uncontested, stable, or noncontingent starting point.⁵⁹

Interpretation has two sides: on the one side, tradition limits the vision of the interpreter as he or she approaches the text, yet on the other side, tradition does not exist unless people constantly create and recreate it through the interpretive process itself. The latter side emphasizes that tradition is created as an ever new meaning of the text comes into being: as we participate in tradition by interpreting texts, we transform and reconstitute that tradition. The two sides of interpretation are not separate and do not function independently, rather they are simultaneous and interrelated. They resonate together as meaning comes into being within the hermeneutic circle.

Feldman, *Republican Revival/Interpretive Turn*, *supra* note 5, at 711-12 (footnotes omitted).

56. See GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 462; *see id.* at 164-65.

57. *Id.* at 308.

58. *See id.* at 307-08, 340-41; Feldman, *New Metaphysics*, *supra* note 5, at 683-84.

59. David Couzens Hoy writes:

[H]ermeneutics maintains that understanding is always already interpretation, suggesting thereby that understanding is always conditioned by the context in which it occurs. Similarly, understanding is always already application in the sense that the understanding not only arises from a contextual background but also focuses specific features of the context, highlighting some and thereby reconfiguring the context in the very act of reaching an understanding of the specific statute.

David Couzens Hoy, *Intentions and the Law: Defending Hermeneutics*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE*, *supra* note 39, at 173, 174; *see* Fred Dallmayr, *Hermeneutics and the Rule of Law*, in *LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE*, *supra* note 39, at 3, 13-15 (describing hermeneutics as a unified process).

Gadamer's notion of a unified hermeneutic act directly corresponds with his metaphysical stance. Contrary to Patterson's characterization of interpretivism, Gadamer explicitly rejects modernist metaphysics, which opposes an autonomous subject or interpreter against an objective text. Thus, a text is not an object in a foundationalist sense — no uninterpreted source of meaning stands outside of or prior to interpretation.⁶⁰ Instead, no matter what we do, we are always and already interpreting. In Gadamer's terms, hermeneutics is ontological.⁶¹ Our very being-in-the-world is interpretive, and hence, we can never escape interpretation and understanding. Moreover, each interpretive encounter is itself ontological. For example, Gadamer argues that when one views a picture, one does not approach it as a subject to an object; rather, the picture is an "ontological event"⁶² in which "being appears, meaningfully and visibly."⁶³ The hermeneutic act, then, is an ontological event in which meaning "comes into being."⁶⁴ This ontological hermeneutics leaves no room for a disjointed hermeneutic act that would radically separate understanding and interpretation. Understanding, interpretation, and application must remain conceptually and sociologically united to maintain the ontological quality of hermeneutics. That is, understanding, interpretation, and application *all* are necessary components of the ontological event in which meaning comes into being.⁶⁵

This vision of a unified hermeneutic act is of paramount importance in responding to Patterson's major criticisms of postmodern interpretivism. Basically, Patterson articulates two related charges. First, he claims that understanding must be distinguished from interpretation: understanding is primary and prereflective, while interpretation is secondary and reflective. Second, he claims that if understanding and interpretation are not sharply differentiated — if understanding is construed as a type of interpretation — then we fall into an infinite regress of in-

60. As Fish claims:

[T]here is no such thing as literal meaning, if by literal meaning one means a meaning that is perspicuous no matter what the context and no matter what is in the speaker's or hearer's mind, a meaning that because it is prior to interpretation can serve as a constraint on interpretation.

STANLEY FISH, *Introduction: Going Down the Anti-Formalist Road, in DOING WHAT COMES NATURALLY*, *supra* note 13, at 4; see Stanley E. Fish, *With the Compliments of the Author: Reflections on Austin and Derrida*, 8 *CRITICAL INQUIRY* 693, 700 (1982).

61. See GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 137, 159, 477-91.

62. *Id.* at 140; see *id.* at 144.

63. *Id.* at 144; see *id.* at 489.

64. *Id.* at 462; see *id.* at 164-65.

65. In discussing the aesthetic experience of art, Gadamer notes: "Understanding must be conceived as a part of the event in which meaning occurs, the event in which the meaning of all statements . . . is formed and actualized." *Id.* at 164-65.

interpretations that dooms us to solipsistic relativism. In response to the first charge, if the hermeneutic act is a unity, as Gadamer maintains, then understanding and interpretation cannot be sharply separated. Neither understanding *nor* interpretation stands prior to the other, but instead they resonate in a reciprocal, dialectical relationship. In a sense, then, understanding is merely a momentary pause in interpretation. Understanding is a moment when the interpreter senses, at least temporarily, that she has arrived at the meaning of the text. Yet, simultaneously, the whole point or purpose of interpretation is to reach understanding; consequently, to talk of interpretation as independent of understanding is nonsensical. Understanding is always interpretive, but interpretation is nothing but the movement of understanding.⁶⁶

What does it mean, though, to assert that understanding is always interpretive? To Gadamer, it means nothing more than that we *always* open to and reach understanding *only* because of and through our prejudices and interests, which are derived from our communal traditions. Even understanding that is prereflective necessarily arises only because of our traditions and prejudices. In other words, even when one does not deliberate consciously about the meaning of the text, but rather appears to grasp its meaning immediately, that immediate grasp is possible only because the individual is situated within a horizon constituted by traditions and prejudices. In Stanley Fish's words: "A meaning that seems to leap off the page, propelled by its own self-sufficiency, is a meaning that flows from interpretive assumptions so deeply embedded that they have become invisible."⁶⁷

Furthermore, communal traditions neither are fixed, precisely bounded entities, nor are they passed on to individuals through some precise method or mechanical process. Balkin provocatively suggests that traditions are akin to "cultural software" insofar as they "become part of us and shape the way that we perceive the legal and social world."⁶⁸ Nonetheless, traditions differ from computer software pro-

66. In a related vein, Hayden White writes:

Understanding is a process of rendering the unfamiliar . . . familiar; of removing it from the domain of things felt to be "exotic" and unclassified into one or another domain of experience encoded adequately enough to be felt to be humanly useful, nonthreatening, or simply known by association. This process of understanding can only be tropological in nature, for what is involved in the rendering of the unfamiliar into the familiar is a troping that is generally figurative.

HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 5 (1978).

67. STANLEY FISH, *Still Wrong After All These Years*, in *DOING WHAT COMES NATURALLY*, *supra* note 13, at 356, 358.

68. Balkin, *Understanding*, *supra* note 36, at 167; *see id.* at 142.

grams in two important ways: traditions cannot be reduced to a fixed quantum of data like computer software programs, and traditions cannot be *perfectly* installed or copied into each of us. To the contrary, traditions themselves take hold of us only through an interpretive process; traditions address us and must be absorbed or learned — often tacitly or unconsciously.⁶⁹ Moreover, traditions are not static; they are constantly evolving, communal, social arrangements and memories within which we participate and live.⁷⁰ In short, even the most immediate and pre-reflective cognitive processes arise exactly because one has interpretively absorbed communal traditions (and this absorption is often itself prereflective). Consequently, understanding cannot possibly precede interpretation; we can never bypass interpretation to directly access the meaning of a text. Indeed, the ontological quality of the hermeneutic act underscores that the concept of a textual meaning standing prior to interpretation is nonsensical. As Gadamer writes: "Interpretation is not an occasional, post facto supplement to understanding; rather, understanding is always interpretation, and hence interpretation is the explicit form of understanding. In accordance with this insight, interpretive language and concepts [are] recognized as belonging to the inner structure of understanding."⁷¹

Thus, if understanding and interpretation are not sharply differentiated, what of Patterson's second charge: that we are thrown into an infinite regress of interpretations that dooms us to solipsistic relativism? Once again, the notion of a unified hermeneutic act answers this criticism. The unified hermeneutic act includes understanding, interpretation, and *application*. The element of application underscores that the hermeneutic act is always a practical or concrete activity. Gadamer argues that when we approach a text, we typically do so for the purpose of understanding its meaning. For that reason, we anticipate the completeness of the text and assume it can communicate a "unity of meaning."⁷² Otherwise, the hermeneutic act becomes merely hypothetical. Interpretation occurs in a concrete context, not in some hypothetical,

69. See GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 461-63; see also J.M. Balkin, *Ideology as Cultural Software*, 16 CARDOZO L. REV. 1221-23 (1995) (acknowledging drawbacks of the metaphor of cultural software).

70. In a related vein, Anthony Giddens writes: "[T]ransient encounters of daily life cannot be conceptually separated from the long-term development of institutions. The most casual exchange of words involves the speakers in the long-term history of the language via which their words are formed, and simultaneously in the continuing reproduction of that language." ANTHONY GIDDENS, *PROFILES AND CRITIQUES IN SOCIAL THEORY* 11 (1982).

71. GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 307.

72. See *id.* at 293-94.

abstract never-never land. In the reality of a concrete context, we are able to grasp the point of a text without slipping into an infinite regress bereft of meaning.⁷³

Moreover, neither traditions nor prejudices are mere mental forms or ideas that can be replaced by simply imagining different forms or ideas. Prejudices and interests often are learned or absorbed in a deep sense; they become embodied in individuals. Prejudices and interests, then, are *not* like a pair of rose-colored glasses that can be removed and replaced with a pair of green-tinted glasses. To the contrary, once entrenched or learned, particular prejudices and interests are not easily changed or shaken, though they always remain contingent and potentially alterable.⁷⁴

Additionally, prejudices, interests, and traditions arise from and are constituted by experiences that are mediated through language. And language, as a practical activity, is communicated through concrete experiences and actions.⁷⁵ For example, a child learns through a multitude of social interactions the meaning of being a doctor in our society. The child might be a patient of a doctor who talks to and physically treats

73. At a particular point in time, a text can seem to have a multiplicity of meanings only if we imagine it as decontextualized, as existing in some abstract sense. But as Stanley Fish notes, we always encounter a text in a concrete context, and hence, the text always has a determinate meaning (though that meaning can change as the context changes). See Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, in INTERPRETIVE SOCIAL SCIENCE — A READER, *supra* note 38, at 243, 256.

74. To me, Gadamer does not adequately make this point, although it is implicit in his approach.

Pierre Bourdieu's notion of the embodiment of a practice suggests that prejudices and interests should be understood not merely as a "state of mind," but as a "state of the body." See PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 68 (Richard Nice trans., Stanford Univ. Press 1990) (1980). In fact, Bourdieu writes that "[l]anguage is a body technique." PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 86 (John B. Thompson ed. & Gino Raymond & Matthew Adamson trans., Harvard Univ. Press 1991) (1982). Thus, we might understand language and tradition as being, in the words of Julia Annas, "socially embodied" or "embodied in various forms of social life." Julia Annas, *MacIntyre on Traditions*, 18 PHIL. & PUB. AFF. 388, 388-89 (1989) (discussing Alasdair MacIntyre's notion of tradition); see Feldman, *The Persistence of Power*, *supra* note 5, at 2258-61 (criticizing Habermas's argument that we can separate symbolic reproduction in a lifeworld from material reproduction).

75. James Boyd White writes:

[O]ur acts of language are actions in the world, not just in our minds. Even when we think we are simply communicating information, or being rigorously and exclusively intellectual, or just talking, we are in fact engaged in performances, in relation to others, that are ethical and political in character and that can be judged as such.

JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* ix (1990).

the child; the child might see his or her parents or other individuals interact with physicians; the child might hear different people discuss doctors; and the child might read books or watch movies or television shows that portray physicians. Over time, the child thus acquires the meaning of being a doctor through the accumulation of these experiences, although the meaning is always mediated through language. That is, these social experiences gain meaningful shape only through linguistic concepts already existing in the community. Thus, the child eventually learns that a doctor talks in a particular manner, performs certain tasks, and wears a certain type of clothing. The child, in effect, carries these characteristics as prejudices that shape the child's conception or fore-understanding of the role of physicians in the community. The child does not acquire these prejudices in some ideal world of abstractions; instead, the child concretely experiences doctors and representations or portrayals of them.⁷⁶

At this point, it is worth noting that my argument merges close to Patterson's argument. Patterson argues that understanding, as a practice or practical activity, provides the footing that prevents us from sliding into an infinite interpretive regress. I now argue that postmodern interpretivism does not send us sliding into an infinite interpretive regress because the unified hermeneutic act includes the practical component of application. In fact, the similarity between our arguments on this point suggests that, perhaps, the differences between our entire positions are less than at first appeared. Maybe the distinction between Patterson's Wittgensteinian pragmatism and my postmodern interpretivism is the proverbial distinction without a difference.⁷⁷ After all, we both reject hermeneutic foundationalism, and we both emphasize prereflective cognition. Maybe, then, the disagreement is no more than a dispute over semantics. Patterson refers, first, to understanding as prereflective cognitive activity and, second, to interpretation as deliberate reflection on the meaning of a text. I refer to all cognitive activities, whether reflective or prereflective, as hermeneutic acts that include an interpretive component.

76. See PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967); Feldman, *Exposing*, *supra* note 5, at 1341-43 & nn.39-42; Feldman, *Republican Revival/Interpretive Turn*, *supra* note 5, at 710-11. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 19e (G.E.M. Anscombe trans., 3d ed. 1958) (arguing that language is a form of life, and hence, philosophical questions arise when "language goes on holiday").

77. See generally RICHARD J. BERNSTEIN, *What Is the Difference that Makes a Difference?* Gadamer, Habermas, and Rorty, in *PHILOSOPHICAL PROFILES* 58 (1986) (discussing whether the distinctions among Gadamer, Habermas, and Rorty are significant).

In fact, I believe that with a bit of tinkering, we might get our definitions to match, and our disagreement would dissolve — almost. There is an additional problem. Our disagreement about terminology manifests a sharp political difference between us. Patterson attacks postmodern interpretivism for textual indeterminacy, solipsistic relativism, and ultimately, political conservatism. In fact, many others also have charged Gadamer with conservatism for too readily accepting the authority of tradition and the conventional meaning of the text.⁷⁸ Ironically, however, this charge of political conservatism applies more accurately to Patterson than to Gadamer. Patterson's concept of understanding embodies an uncritical acceptance of the normal or conventional. To Patterson, understanding arises from "conventional meanings"⁷⁹ and is expressed by acting "properly"⁸⁰ or "appropriately"⁸¹ in response to an utterance or request; acting improperly apparently indicates misunderstanding, not resistance or criticism. Indeed, most tellingly, the crux of Patterson's argument seems to be that postmodern interpretivism goes wrong because it requires us (at least in his opinion) to use the terms "understanding" and "interpretation" in unconventional or unusual ways.⁸² According to Patterson's Wittgensteinian pragmatism, the mere fact that we ordinarily use words in a particular manner invests that usage with some normative priority or a presumption of rightness.⁸³ Metaphorically speaking, Patterson tries to re-execute Socrates (the postmodern interpretivists) for questioning tradition.⁸⁴ Hence, unsurpris-

78. See, e.g., John D. Caputo, *Gadamer's Closet Essentialism: A Derridean Critique*, in *DIALOGUE AND DECONSTRUCTION* 258, 258-59 (Diane P. Michelfelder & Richard E. Palmer eds., 1989); Jürgen Habermas, *A Review of Gadamer's Truth and Method*, in *UNDERSTANDING AND SOCIAL INQUIRY* 335, 359-60 (Fred R. Dallmayr & Thomas A. McCarthy eds., 1977); Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871, 874, 892, 957 (1989).

79. Patterson states that we engage in interpretation only "when *conventional meanings* are called into question. [Therefore] interpretation is dependent upon *conventional* understanding and practice." Patterson, *supra* note 6, at 54-55 (emphasis added).

80. *Id.* at 21.

81. *Id.* at 20.

82. For example, Patterson claims that interpretive universalism is "born of a lack of attention to some obvious features of ordinary understanding." *Id.* at 3. He continues: "[T]his [interpretive] account of the nature of legal understanding is profoundly misleading. It turns the ordinary into the mysterious, and it fails to account for the fact that understanding and interpretation are distinct activities." *Id.* at 7.

83. For example, Richard Shusterman insists that we must distinguish understanding as prereflective cognition from interpretation as reflective activity in order to defend the ordinary use of the word understanding. See Shusterman, *supra* note 29, at 195-99. He writes that "interpretation standardly implies some deliberate or at least conscious thinking, while understanding does not." *Id.* at 190.

84. See generally RICHARD TARNAS, *THE PASSION OF THE WESTERN MIND* 26-35 (1991) (comparing the Sophists, as skeptical pragmatists, with Socrates).

ingly, when Patterson muses about "the task of jurisprudence,"⁸⁵ he insists that it is largely descriptive, not critical: "The task of jurisprudence is the accurate description of the forms of argument used by lawyers to show the truth of propositions of law."⁸⁶ That is, jurisprudence should describe how lawyers use words in the practice of law. In short, Patterson's fear of relativism and nihilism induces him to retreat toward a Burkean acceptance of tradition and conventions.⁸⁷

Whereas Patterson seems truly conservative, Gadamer is potentially radical in two ways. First, Gadamer insists that the interpreter must risk her prejudices by opening up to the meaning of the text. Gadamer refuses to endorse a hermeneutic vision in which an interpreter blithely imposes her preferred meaning on the text. Rather, the hermeneutic act should be a conversational or dialogical exchange between the interpreter and text. Through this hermeneutic act, the interpreter changes as meaning comes into being. Second, Gadamer's philosophical hermeneutics contains a potential deconstructive component. While Gadamer emphasizes the anticipation of a complete and unified textual meaning, his approach also implicitly contains the seeds for a deconstructive attack on the conservative acceptance of textual meaning.⁸⁸ To develop this second point, I will now turn to Derridean deconstruction and Balkin's argument concerning justice.

85. Patterson, *supra* note 6, at 56.

86. *Id.* Patterson continues by arguing:

Jurisprudence should turn its attention away from the fixation on interpretation and study the ways in which lawyers go about the task of justifying propositions of law. Finally, we must continue to pay attention to the ways in which the meaning of law is called into question and rival interpretations adjudicated.

Id. (footnote omitted). Even here, where Patterson hints at a more critical purpose for jurisprudence, he casts it in a largely descriptive manner. He does not recommend intervening or participating in the questioning of the meaning of law, but rather he suggests that we "pay attention" to the ways in which such questioning ordinarily occurs. It is not until the very last sentence of the article that Patterson finally suggests a stronger critical stance when he writes: "[T]he central task of jurisprudence is the perspicuous description and critical appraisal of our practices of legal justification." *Id.*

87. Cf. George A. Martinez, *The New Wittgensteinians and the End of Jurisprudence*, 29 LOY. L.A. L. REV. 545, 549, 558-65 (1996) (arguing that to later Wittgenstein and his followers, philosophy should be purely descriptive of ordinary language; therefore, critics have charged that this ordinary language type of approach to philosophy fails to seek to critique and reconstruct language); see also Winter, *supra* note 15, at 1867.

88. Cf. Gerald L. Bruns, *Law and Language: A Hermeneutics of the Legal Text*, in LEGAL HERMENEUTICS: HISTORY, THEORY, AND PRACTICE *supra* note 39, at 23, 26 (arguing that Gadamer can be interpreted as reactionary or radical).

II. ON POSTMODERN INTERPRETIVISM AND JUSTICE

A. *The Relation Between Philosophical Hermeneutics and Deconstruction*

As a manifestation of postmodern interpretivism, Derridean deconstruction shares much in common with philosophical hermeneutics.⁸⁹ No less so than hermeneutics, deconstruction can be understood as an attempt to identify the irreducible conditions of human understanding.⁹⁰ Both Gadamer and Derrida explore how we come to understand texts despite rejecting the foundationalist metaphysics of modernism.⁹¹ In Derridean terms, meaning is never grounded on a stable signified; rather, there "is always already" a play of signifiers.⁹² Derrida states:

From the moment that there is meaning there are nothing but signs. We *think only in signs*. Which amounts to ruining the notion of the sign One could call *play* the absence of the transcendental signified as limitlessness of play, that is to say as the destruction of . . . the metaphysics of presence.⁹³

Hence, deconstruction echoes the central ontological tenet of hermeneutics that we are always and already interpreting. As Derrida says,

89. Many critics of deconstruction mistakenly assume that it "encourages the idea of criticism as a kind of free-for-all hermeneutic romp, an activity where no constraints apply save those brought to bear by some arbitrary set of interpretative codes and conventions." NORRIS, *supra* note 5, at 137. I agree with Norris, Balkin, Staten, and others who argue that this characterization of deconstruction presents only one (distorted) manifestation of it; Derrida does not subscribe to this type of "sophistical freeplay." *Id.* at 151; see *id.* at 49-53, 140; HENRY STATEN, WITTGENSTEIN AND DERRIDA (1984); Balkin, *supra* note 7, at 1152.

90. See *supra* text accompanying note 39; cf. Diane Michelfelder & Richard Palmer, *Introduction to DIALOGUE AND DECONSTRUCTION*, *supra* note 78, at 1, 7-9 (noting that it can be argued that Derrida is the supreme hermeneutician of the twentieth century, and Gadamer the ultimate deconstructionist).

91. The relation between Derrida and Wittgenstein is, of course, problematic. Compare STATEN, *supra* note 89, at 1, 64-108 (claiming that the later Wittgenstein achieves a consistent deconstructionist standpoint, in the Derridian sense) with NEWTON GARVER & SEUNG-CHONG LEE, DERRIDA AND WITTGENSTEIN (1994) (arguing that though Wittgenstein and Derrida share similarities, Wittgenstein presents the stronger position considering their significant differences).

92. Derrida writes that "the signified is originarily and essentially (and not only for a finite and created spirit) trace, that it is *always already in the position of the signifier*." DERRIDA, GRAMMATOLOGY, *supra* note 3, at 73; see *id.* at 47, 50; see also JAMESON, *supra* note 5, at 96. Derrida and Gadamer use the term "play" in different ways. See Fred Dallmayr, *Hermeneutics and Deconstruction: Gadamer and Derrida in Dialogue*, in DIALOGUE AND DECONSTRUCTION, *supra* note 78, at 75, 82; Neal Oxenhandler, *The Man with Shoes of Wind: The Derrida-Gadamer Encounter*, in DIALOGUE AND DECONSTRUCTION, *supra* note 78, at 265, 266.

93. DERRIDA, GRAMMATOLOGY, *supra* note 3, at 50; see DERRIDA, POSITIONS, *supra* note 3, at 20.

there is no foundation for the "coming into being" of signs.⁹⁴ The continual play or coming into being of signs or signifiers relates to Derrida's central concept of *différance*.

[T]he signified concept is never present in and of itself, in a sufficient presence that would refer only to itself. Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other concepts, by means of the systematic play of differences. Such a play, *différance*, is thus no longer simply a concept, but rather the possibility of conceptuality, of a conceptual process and system in general. For the same reason, *différance*, which is not a concept, is not simply a word, that is, what is generally represented as the calm, present, and self-referential unity of concept and phonic material.⁹⁵

Just as Gadamer emphasizes that our prejudices arise from communal traditions, Derrida argues that we always borrow concepts "from the text of a heritage."⁹⁶ We can never escape our heritage or, in Gadamerian terms, step outside of our horizon. According to Derrida, we are limited to "givens belonging to the discourse of our time,"⁹⁷ and hence, even "deconstruction always in a certain way falls prey to its own work."⁹⁸ That is, deconstruction always necessarily uses and reinscribes the metaphysics and linguistic structures that it seeks to deconstruct.⁹⁹ Moreover, to Derrida, as well as to Gadamer, the givens of our

94. DERRIDA, *GRAMMATOLOGY*, *supra* note 3, at 48.

95. DERRIDA, *Différance*, *supra* note 3, at 11. Derrida further states:

The play of differences supposes, in effect, syntheses and referrals which forbid at any moment, or in any sense, that a simple element be *present* in and of itself, referring only to itself. Whether in the order of spoken or written discourse, no element can function as a sign without referring to another element which itself is not simply present. This interweaving results in each "element" . . . being constituted on the basis of the trace within it of the other elements of the chain or system. This interweaving, this textile, is the *text* produced only in the transformation of another text. Nothing, neither among the elements nor within the system, is anywhere ever simply present or absent. There are only, everywhere, differences and traces of traces. . . .

. . . *Différance* is the systematic play of differences, of the traces of differences, of the *spacing* by means of which elements are related to each other. This spacing is the simultaneously active and passive (the *a* of *différance* indicates this indecision as concerns activity and passivity, that which cannot be governed by or distributed between the terms of this opposition) production of the intervals without which the "full" terms would not signify, would not function.

DERRIDA, *POSITIONS*, *supra* note 3, at 26-27.

96. DERRIDA, *Structure*, *supra* note 3, at 285.

97. DERRIDA, *GRAMMATOLOGY*, *supra* note 3, at 70.

98. *Id.* at 24.

99. Derrida describes this process as follows:

[A]ll these destructive discourses and all their analogues are trapped in a kind of circle. This circle is unique. It describes the form of the relation between the history of metaphysics and the destruction of the history of metaphysics. There is no

heritage — our communal traditions — neither are fixed and precisely bounded entities nor are they passed on to individuals through some precise method or mechanical process.¹⁰⁰

If philosophical hermeneutics and deconstruction share so much in common, then what are the differences? In a sense, Gadamer pauses to celebrate moments of meaning and truth, while Derrida does not.¹⁰¹ Both Gadamer and Derrida stress that any text or event has many potential meanings, many possible truths; no single meaning remains fixed or stable in all contexts. Both would agree that "truth keeps happening."¹⁰² Yet, while Gadamer therefore considers the meaning of a text to be inexhaustible, Derrida considers it undecidable.¹⁰³ To Gadamer, a determinate meaning arises in each concrete context, but because contexts can vary, the potential meaning of a text is never exhausted. Gadamer, as already discussed, emphasizes that the unified hermeneutic act includes a practical component (application), so that we anticipate the completeness of the text and assume it can communicate a "unity of meaning."¹⁰⁴ Thus, because Gadamer focuses on the practicality of the hermeneutic act, he tends to view understanding primarily as a positive and empowering experience.¹⁰⁵

Gadamer consequently downplays the deconstructive component that presents itself in the hermeneutic act, even as he implicitly suggests it. He explains that our prejudices both enable *and* constrain understanding and interpretation. Prejudices not only open us to the possibility of understanding, but they also necessarily constrain and direct our understanding and communication. One's life within a community and its cultural traditions thus always limits or distorts one's range of vision,

sense in doing without the concepts of metaphysics in order to shake metaphysics. We have no language — no syntax and no lexicon — which is foreign to this history; we can pronounce not a single destructive proposition which has not already had to slip into the form, the logic, and the implicit postulations of precisely what it seeks to contest.

DERRIDA, *Structure*, *supra* note 3, at 280-81.

100. See BAUMAN, *INTIMATIONS*, *supra* note 5, at 23.

101. In more mundane terms, if Gadamer and Derrida were looking at a glass of water, Gadamer probably would say it is half full, while Derrida likely would say it is half empty.

102. WEINSHEIMER, *supra* note 2, at 9; see *id.* at 200 (noting that the truth of a text exceeds each understanding); cf. BAUMAN, *INTIMATIONS*, *supra* note 5, at 31 (stating that postmodern culture "is characterized by the overabundance of meanings").

103. See MADISON, *supra* note 3, at 115; Hoy, *supra* note 3, at 54.

104. See GADAMER, *TRUTH AND METHOD*, *supra* note 2, at 293-94.

105. See MADISON, *supra* note 3, at 113-14 (observing that Gadamer's emphasis on application separates hermeneutics from deconstruction).

or what one can possibly perceive or understand.¹⁰⁶ Furthermore, Gadamer emphasizes that because we are historical beings who *live* in tradition, just as we live in a community, tradition is something in which we constantly participate. Thus, we constantly constitute and reconstitute our tradition, our culture, and our community as we engage in hermeneutic actions.¹⁰⁷ This constant reconstitution always is simultaneously constructive *and* destructive. On the one hand, it is constructive because we constantly build new traditions and communities, constantly adding to our already existing traditions and communities through interpretation and understanding. Through hermeneutic actions, we include new concepts, interests, prejudices, and participants in our traditions and communities. On the other hand, this reconstitution is also destructive — distortive and exclusive — insofar as we weaken or eliminate previously existing traditions and communities and exclude concepts, interests, prejudices, and participants.¹⁰⁸ In short, as Gadamer articulates the hermeneutic act, interpretation and understanding are distortive and destructive in two ways: first, our prejudices are manifestations of power that constrain the possibilities for understanding; and second, the reconstitution of tradition (also a manifestation of power) necessarily destroys and excludes certain prejudices, interests, and participants. Consequently, coercion, domination, exclusion, and other distortive effects of power are always part of the hermeneutic act.¹⁰⁹ The deconstructive component of hermeneutics hides within these destructive and distortive effects.

Thus, Gadamer's articulation of philosophical hermeneutics contains deconstructive potential, yet he fails to pursue it.¹¹⁰ Here, then, is

106. See STANLEY FISH, *Critical Self-Consciousness, or Can We Know What We're Doing?*, in *DOING WHAT COMES NATURALLY* 436, 450-55 (1989).

107. See JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984); James Boyd White, *Judicial Criticism*, 20 GA. L. REV. 835, 867 (1986).

108. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 17 (1988) (claiming that whenever a community rests upon an authoritative text, different modes of interpretation are likely to splinter that community); Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414-15 (1989) (arguing that storytelling both builds and destroys community).

109. See Feldman, *The Persistence of Power*, *supra* note 5, at 2262-66; Feldman, *Republican Revival/Interpretive Turn*, *supra* note 5, at 705-31; cf. James Risser, *The Two Faces of Socrates: Gadamer/Derrida*, in *DIALOGUE AND DECONSTRUCTION*, *supra* note 78, at 176, 179-83 (suggesting that Gadamer's philosophical hermeneutics has deconstructive potential).

110. Gadamer's grasp of the deconstructive potential of philosophical hermeneutics emerges most clearly in his criticism of Habermas's ideal speech situation. See Feldman, *The Persistence of Power*, *supra* note 5, at 2258-66; Hoy, *supra* note 3, at 61-

the crux of the distinction between Gadamer and Derrida. Whereas Gadamer focuses on the constructive and enabling power of the hermeneutic situation, Derrida focuses on its destructive and disabling component. Yet both parts are always and already present, as if there were a hermeneutic and sociological law of conservation of power: if a hermeneutic act produces meaning and empowers certain individuals and societal groups, it simultaneously represses and destroys potential meaning and disempowers other individuals and groups.¹¹¹ Thus, for example, Gadamer describes how tradition enables us to open to the meaning of a text, but Derrida warns us that the authority of tradition is "purchased by deep violence."¹¹² Tradition opens us to understanding because in part it provides an authoritative background context for the hermeneutic act; tradition thus operates most effectively when it is forgotten from conscious memory. But Derrida wants to remind us about tradition, to bring the background to the foreground, and to underscore how tradition often establishes its authority through brutality and duplicity.

Because Derrida concerns himself with the disempowering and destructive quality of the hermeneutic situation, he cares little about deciding among the many potential meanings or truths of a text. Disempowerment, quite simply, is not about making decisions; rather, it is about lacking the power to decide. Derrida is not interested in the practical component of the hermeneutic act since he does not seek to pursue or reconstruct a unified meaning for the text. To the contrary, Derrida seeks to find and highlight the trace of the Other that always hides in the margins of our understanding. Derrida seeks to uncover the violence that necessarily exists when we understand a text — the violence that is inevitably obscured in the practical quest for a usable and therefore unified meaning. To Derrida, violence manifests itself in the hermeneutic definition, exclusion, denial, and oppression of the Other — a concealed outsider — and stands as an irreducible condition (or *limit*) of

62. However, John Brenkman argues that Gadamer does not sufficiently recognize the distortive power of tradition; rather, he accepts tradition as authoritative. See JOHN BRENKMAN, *CULTURE AND DOMINATION* 30-38 (1987); cf. WARNKE, *supra* note 2, at 91, 99 (questioning whether Gadamer conservatively accepts tradition).

111. I do not mean to suggest that the total value or quantity of power always remains the same through all social and hermeneutic events. Rather, I suggest that every hermeneutic event is both constructive and destructive, though any particular event may be more one than the other. Cf. Feldman, *The Persistence of Power*, *supra* note 5, at 2282-88 (noting that not all traditions and communities are equally distortive and exclusive).

112. Caputo, *supra* note 78, at 263.

human understanding.¹¹³ Within the hermeneutic process of understanding, we always and already define some Other; we necessarily deny the potential meanings arising from some other perspective and exclude those potential meanings from our communal traditions. Without the Other, without the trace of denied potential meaning, "no meaning would appear" at all.¹¹⁴ Indeed, the Other is not just *on* the outside, but rather the Other *is* the outside — the location of the Other defines the outside.¹¹⁵ Thus, understanding is a political act because, in announcing the meaning of the text, it normatively and substantively defines inside and outside. No preexisting border exists. Hence, Derridean deconstruction also is political: it uncovers the hidden, the oppressed, the violated, the denied — the Other.¹¹⁶ Gadamer may want to open to the Otherness of the text, but Derrida wants to reveal the Otherness suppressed by our understanding of the text.

An imaginary dialogue between Gadamer and Derrida might go as follows:

Gadamer: "Our participation in tradition enables us to understand texts."

113. Derrida states:

The trace, where the relationship with the other is marked, articulates its possibility in the entire field of the entity . . . which metaphysics has defined as the being-present starting from the occulted movement of the trace. The trace must be thought before the entity. But the movement of the trace is necessarily occulted, it produces itself as self-occultation. When the other announces itself as such, it presents itself in the dissimulation of itself. . . . The field of the entity, before being determined as the field of presence, is structured according to the diverse possibilities — genetic and structural — of the trace. The presentation of the other as such, that is to say the dissimulation of its "as such," has always already begun and no structure of the entity escapes it.

DERRIDA, *GRAMMATOLOGY*, *supra* note 3, at 47.

Norris places Derrida in the Kantian tradition insofar as Derrida seeks to identify the irreducible conditions of human understanding. But, as Norris points out, Derrida uses the Kantian transcendental method in an unusual way: "[Derrida has a] very different way of posing the transcendental question: namely, by asking what conditions of impossibility mark out the limits of Kantian conceptual critique." NORRIS, *supra* note 5, at 200. That is, Derrida can be understood as asking what are the conditions that must be denied or oppressed to render understanding possible.

114. DERRIDA, *GRAMMATOLOGY*, *supra* note 3, at 62.

115. For example, when Derrida deconstructs the privileging of speech over writing, he states that writing will always "be the outside." *Id.* at 31. In other words, writing, which is in this case the Other or the supplement, is not just *on* the outside, but rather it *is* the outside. See also DERRIDA, *Plato*, *supra* note 3 (deconstructing Plato's *Phaedrus*, which focuses on the importance of speech over writing).

116. Cf. STEPHEN K. WHITE, *POLITICAL THEORY AND POSTMODERNISM* 16 (1991) (recognizing that deconstruction is political because it often exposes power where reason alone previously appeared).

Derrida: "Yes, but what legitimates tradition? Tradition arises partly through violence and deception."

Gadamer: "Your desire for legitimacy merely reenacts modernist metaphysics. What do you want? A stable foundation?"

Derrida: "You are right. But you make exactly the point I am trying to stress. There is no legitimating ground for meaning other than tradition, but there is, in turn, no legitimating ground for tradition itself. Tradition is neither completely legitimate nor illegitimate.¹¹⁷ Understanding, therefore, necessarily is based on blindness and hypocrisy as we ignore and deny the violence and deception within tradition."¹¹⁸

Gadamer: "Yes, but that's exactly the point. We do communicate. We do understand. These are practical activities that necessarily continue without legitimating foundations."

Derrida: "Yes, but the violence, the oppression, the denial"

And so on. To Gadamer, this debate is inexhaustible. A new perspective constantly comes into being as our horizons shift, but nonetheless we continue along in our pragmatic fashion — communicating, understanding, and interpreting. To Derrida, this tension between philosophical hermeneutics and deconstruction is undecidable. We are caught in a never-ending dialectic between the necessity and inadequacy of our linguistic forms. Both Derrida and Gadamer might agree, however, that we do not need to choose between hermeneutics and deconstruction. In fact, a choice does not even make sense.¹¹⁹ philosophical hermeneutics and deconstruction represent different planes or

117. In writing about law and justice, Derrida observes:

Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of "illegal." They are neither legal nor illegal in their founding moment.

Derrida, *Law*, *supra* note 3, at 943.

118. See NORRIS, *supra* note 3, at 197-98.

119. For example, Derrida suggests that he, like everybody else, engages in the practical activity of interpretation when he acknowledges that he always is "analyzing, judging, evaluating this or that discourse." Jacques Derrida, *Like the Sound of the Sea Deep Within a Shell: Paul de Man's War*, 14 CRITICAL INQUIRY 590, 631 (Peggy Kamuf trans., 1988) [hereinafter Derrida, *Sound of the Sea*]; cf. DERRIDA, *Structure*, *supra* note 3, at 292-93 (stating that two forms of interpretation are "absolutely irreconcilable," so there is no "question of choosing"). Gadamer maintains that hermeneutics and deconstruction both try to continue Heidegger's effort to overcome metaphysics, though they do so along different paths. See Hans-Georg Gadamer, *Destruktion and Deconstruction*, in DIALOGUE AND DECONSTRUCTION, *supra* note 78, at 102, 109; see also Fred Dallmayr, *Self and Other: Gadamer and the Hermeneutics of Difference*, 5 YALE J.L. & HUMAN. 507, 515-16 (1993) (observing that to Gadamer, deconstruction contains insights that are germane to hermeneutics).

axes in postmodern interpretivism. They both help us to comprehend the hermeneutic act, or how we come to understand a text (legal or otherwise). Philosophical hermeneutics and deconstruction thus complement each other in that hermeneutics illuminates the affirmative coming into being of meaning, while deconstruction stresses the limits of communication and understanding.¹²⁰ This recognition takes us to Balkin and his discussion of deconstruction and justice.

B. *Postmodern Vertigo*

In 1990, Derrida published *Force of Law: The "Mystical Foundation of Authority."*¹²¹ At that time, Derrida noted that although deconstruction often had *appeared* not to address the problem of justice, deconstruction had "done nothing but address [justice], if only obliquely, unable to do so directly."¹²² In *Force of Law*, however, Derrida focused on the relation between deconstruction and justice by exploring how the violence (or force) of law often is deemed just or legitimate.¹²³ Derrida concluded that a "'mystical' limit" appears at the origin of law as law claims to rest on ultimately ungrounded authority.¹²⁴ Justice itself, according to Derrida, is always displaced; it is never fully experienced. Justice is an "infinite demand."¹²⁵ we constantly desire justice, but fulfillment of our desire always remains just beyond our reach.¹²⁶

120. Using Balkin's terms, I might argue that philosophical hermeneutics and deconstruction exist in a "nested opposition." As Balkin describes this state:

To deconstruct a conceptual opposition is to show that the conceptual opposition is a nested opposition — in other words, that the two concepts bear relations of mutual dependence as well as mutual differentiation. For example, we might discover that they have elements in common, which become salient in some contexts, but that in other contexts we note very important differences between them, so that they are not the same in all respects. In fact, we would note that the meaning of each depends in part on our ability to distinguish it from the other in some contexts.

Balkin, *supra* note 7, at 1153.

121. Derrida, *Law*, *supra* note 3.

122. *Id.* at 935. Derrida adds that deconstructionists seek to intervene and change the polis and social world, not through strategic and controlled intervention, but "in the sense of maximum intensification of a transformation in progress." *Id.* at 931-33.

123. Derrida asked the following question: what is the difference between, on the one hand, the force of law that is just or, at least, is deemed legitimate, and on the other hand, force or violence that is unjust? *See id.* at 927.

124. *Id.* at 943.

125. *Id.* at 955.

126. Derrida states:

[T]here is no justice without this experience, however impossible it may be, of aporia. Justice is an experience of the impossible. A will, a desire, a demand for justice whose structure wouldn't be an experience of aporia would have no chance to be what it is, namely, a call for justice. Every time that something

Balkin's article, *Transcendental Deconstruction, Transcendent Justice*,¹²⁷ reacts to Derrida by, in effect, asking why we constantly desire justice when we seem forever unable to reach it. How do we, in other words, explain the infinite demand for justice?¹²⁸ Balkin's article, by trying to explain this infinite demand, can be read not only as a response to Derrida, but also, in part, as a response to Patterson's charge that postmodern interpretivism is relativistic, solipsistic, and undermines social critique.¹²⁹ Balkin declares unequivocally that deconstruction "is decidedly not nihilistic."¹³⁰ I agree with this sentiment and with many of Balkin's other pronouncements regarding deconstruction and justice. For example, I concur with Balkin when he says:

The deconstructor critiques for the purpose of betterment; she seeks out unjust or inappropriate conceptual hierarchies in order to assert a better ordering. Hence, her argument is always premised on the possibility of an alternative to existing norms that is not simply different, but also more just, even if the results of this deconstruction are imperfect and subject to further deconstruction. Such a deconstruction assumes that it is possible to speak meaningfully of the more or the less just; it decidedly rejects the claim that nothing is more just than anything else, or that all things are equally just.¹³¹

Nonetheless, I strongly disagree with Balkin's ultimate conclusions regarding deconstruction and justice. He seemingly has experienced postmodern vertigo: an avowed postmodernist, he looked in the mirror, and saw another mirror, and another, and another. Suddenly, he felt sick, as if he were spinning out of control. So, instinctively, he reached down and grabbed for a piece of firm, modernist ground. Balkin insists

comes to pass or turns out well, every time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law (*droit*) may find itself accounted for, but certainly not justice. Law (*droit*) is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never insured by a rule.

Id. at 947.

127. Balkin, *supra* note 7.

128. Although Balkin focuses his discussion on Derrida's *Force of Law*, Balkin also discusses Jacques Derrida, *Biodegradables: Seven Diary Fragments*, 15 CRITICAL INQUIRY 812 (Peggy Kamuf trans., 1989), and Derrida, *Sound of the Sea*, *supra* note 119.

129. I do not mean to suggest that Balkin expressly intended to respond to Patterson. He did not. In fact, Patterson's article was published after Balkin's. Nonetheless, Balkin responds to the type of charge articulated by Patterson.

130. Balkin, *supra* note 7, at 1142.

131. *Id.* at 1141-42; see *supra* note 120 (I am comfortable with Balkin's concept of nested oppositions).

that for Derrida's arguments on justice to make sense, Derrida "must be committed to a *transcendental* conception of deconstruction, whether or not he specifically recognizes this fact."¹³² I do not wish to debate exactly what *Derrida* must be committed to or what he intended to write; I am, however, interested in further exploring the relation between deconstruction and justice. In particular, Balkin's concept of *transcendental deconstruction* appears intriguing and original, but is ultimately misleading.

According to Balkin, transcendental deconstruction is the only way to explain our infinite demand for justice, our "inexhaustible drive."¹³³ Balkin writes:

The essence of what I am calling *transcendental* deconstruction [is] the interval between the human capacity for judgment and evaluation that inevitably and necessarily *transcends the creations of culture*, and the prescriptions and evaluations of that culture, which in turn articulate and exemplify human values like justice. It is in this sense that transcendental deconstruction depends, as Platonism itself does, on a conception of values that "go beyond" the positive norms of culture and convention. But these transcendent values do not come to us in a fully determinate form; they need culture to turn their *inchoate sense* into an articulated conception. And these transcendent values do not exist in an imaginary Platonic Heaven; they exist rather in the *wellsprings of the human soul*.¹³⁴

Hence, we have an inchoate sense of and inexhaustible drive for justice that do not arise from culture or tradition, but rather emerge from "the wellsprings of the human soul."¹³⁵ All cultural manifestations of our "sense of justice"¹³⁶ are inadequate because they fail to fulfill our urge to attain justice; our sense of justice necessarily transcends concrete cultural productions.¹³⁷ Since our sense of and urge for justice transcend culture, Balkin posits their emergence from the human soul.

132. Balkin, *supra* note 7, at 1154 (emphasis added).

133. *Id.* at 1140.

134. *Id.* at 1139 (emphasis added in part).

135. Balkin elsewhere refers to justice as one of "those indeterminate values or urges located in the human soul, which human beings articulate through positive morality and cultural conventions, and which nevertheless always escape this articulation." *Id.* at 1139.

136. See, e.g., *id.* at 1141, 1155.

137. As Balkin observes:

[H]uman cultural creations will always fail to be perfectly just, but not because they are defective copies of a determinate standard. Their imperfection arises from the necessary inadequation that must exist between an indeterminate and inexhaustible urge and any concrete and determinate articulation of justice. This relationship of inadequacy between culture and value is what we mean by "transcendence." The goal of transcendental deconstruction is to rediscover this transcendence where it has been forgotten.

In fact, Balkin surprisingly insists that transcendental deconstruction saves us from nihilism, that persistent modernist hobgoblin. In Balkin's own words, "[A] transcendental approach to deconstruction [is] the *only* approach that can rescue deconstruction from the *nihilistic* abyss of infinite meaning."¹³⁸ Balkin reasons that the transcendental reach into the wellsprings of the human soul is necessary for social critique. Critique, he claims, cannot be immanent; it cannot arise from within culture itself.

[T]o say that positive norms are inadequate — and hence in order to deconstruct them — we must refer to values that lie beyond the norms we are critiquing and that serve as the source of our criticism, even if we believe that the values we wish to uphold are to some extent realized in our culture. Suppose that we denied that we need concern ourselves with transcendental values: Suppose we assert that we are only interested in engaging in an "immanent" critique. In other words, we say that we are using one aspect of our cultural norms to critique other aspects, and therefore we need make no reference to anything beyond the positive norms of our culture. For example, we might use the commitment to equality expressed in the Civil Rights Act of 1964 to criticize the lack of civil rights for homosexuals in the United States. The question remains, however, why we saw a particular aspect of our cultural practices as a worthy basis for our critique and another aspect as unworthy. Since both are equally aspects of our culture, culture by itself cannot serve as a norm to decide between them.¹³⁹

Balkin admits that one might nonetheless insist that we can use one aspect of our culture to critique other aspects. Balkin argues, however, that to do so we must allow one element of our culture to take precedence over another merely because it predominates quantitatively throughout society. I agree with Balkin's rejection of this rather nonradical form of critique, which would do nothing more than conservatively reinforce the status quo.¹⁴⁰ But Balkin then claims that in order to explain how we are enabled to critique our own cultural norms, we must turn to "transcendent norms of justice." To Balkin, there is no other way to attain a critical viewpoint. Again, he maintains that these norms transcend culture: "Although we *may* find these norms *partially* realized in portions of our own culture, these inadequate articulations do not exhaust their meaning for us."¹⁴¹ And more important, if the

Id. at 1141.

138. *Id.* at 1155 (emphasis added).

139. *Id.* at 1175 (footnote omitted).

140. *See id.*

141. *Id.* at 1175-76 (emphasis added).

norms transcend culture, they must, in Balkin's opinion, arise from the human soul.

By positing a human soul that somehow stands prior to and beyond the reach of culture — a precultural human soul — Balkin becomes a type of neo-liberal, emphasizing the individual and her personal responsibility. Balkin, naturally, urges us to follow his lead:

[We must] abandon antihumanism and to reemphasize the importance of individual subjects in the creation of a culture that in turn creates them. . . . [Derrida's] arguments about justice become incoherent unless he assumes the existence of individuals who are more than the products of cultural writing, and who can bear a responsibility to others, whether this responsibility is infinite or indefinite.¹⁴²

Balkin's argument suggests that *either* the individual stands prior to and above culture *or* the individual becomes a culturally programmed automaton. Faced with this choice, Balkin of course insists that the individual must stand prior to and above culture; otherwise, the concept of personal responsibility becomes moot. By thus separating the individual subject from the cultural (external) world, Balkin reenacts modernist metaphysics — which postmodern interpretivism of course rejects. This metaphysical return to modernism pushes Balkin along toward other errors, as hermetic modernist lines and categories begin to appear. For instance, I agree when Balkin argues that deconstruction can be understood, *in part*, as a method, but in his hands, deconstruction appears to become *no more* than a method — a method to be used by responsible neo-liberal individuals as they pursue certain goals or values, such as justice.¹⁴³ Hence, Balkin suggests that deconstruction and justice are radically distinct. Indeed, he calls his own article an "encounter between deconstruction and justice,"¹⁴⁴ which resembles an "encounter between two parties."¹⁴⁵ He envisions justice as a human value and drive, while deconstruction becomes a method that merely helps us pursue our sense of justice.

142. *Id.* at 1185. Balkin expressly acknowledges the tendency to modernist liberalism inherent in his position: "[W]hen Derrida discusses [ethical responsibilities], one could easily be forgiven for mistaking his discourse with familiar liberal notions of autonomy and free will." *Id.* at 1186.

143. *Cf.* Pierre Schlag, *The Problem of the Subject*, 69 TEXAS L. REV. 1627, 1694-95 (1991) (accusing Balkin of using deconstruction as just another analytical tool because he mistakenly sees Derrida through subject-object metaphysics).

144. Balkin, *supra* note 7, at 1131.

145. *Id.*

Balkin suddenly looks like Kant reincarnate.¹⁴⁶ Just as Kant's transcendental argument posits a noumenal self existing outside of the phenomenal world, Balkin's transcendental argument posits a human soul existing prior to and above culture. Kant does so to explain human experience and knowledge without sacrificing free will, while Balkin does so to explain our inchoate sense of and inexhaustible drive for justice without sacrificing individual responsibility. Postmodern interpretivism, however, renders Balkin's Kantian turn unnecessary. Interpretivism does not undermine responsibility and the drive for justice, as Balkin fears. Balkin, in fact, has it exactly backward.

C. *On Justice*

Postmodern interpretivism can explain how we come to understand justice as a value and as an inexhaustible drive. Although not a neat division, philosophical hermeneutics contributes more to our understanding of justice as a value, while deconstruction contributes more to our understanding of the urge for justice. From a Gadamerian viewpoint, justice is a contested concept within our communal traditions. As with any concept, we open to the meaning of justice, not because our souls transcend culture, but rather because we participate in our communal traditions and culture. Contrary to Balkin's suggestion, our sense of justice does not come from outside our own cultural context or horizon, but from within it. The ontological quality of our being-in-the-world does not undermine justice or eliminate responsibility to others. Instead, the meanings of justice and responsibility come into being exactly because of our being-in-the-world.¹⁴⁷

In short, our sense or meaning of justice is *socially* produced. Consequently, from this perspective, Balkin's argument immediately goes awry when he designates the human soul as the origin or wellspring for our sense of and urge for justice. By positing a precultural human soul, Balkin ignores one of the central messages of postmodern interpretivism: that we can never be outside of our own horizon. We always and already stand within our communal traditions or culture. There is no outside. Even if we are born with some precultural drives or values — such as justice — our being-in-the-world is so *culturally saturated* that a search for a precultural pearl buried somewhere beneath the cultural

146. For a collection of some of Kant's most important writings, see IMMANUEL KANT, *KANT SELECTIONS* (Theodore M. Greene ed., 1929).

147. Hence, Balkin appears to contradict the thrust of his argument when he writes that "culture and language do not efface human autonomy but are the conditions of its very possibility." Balkin, *supra* note 7, at 1186.

waves seems at best irrelevant and at worst nonsensical. We should focus not on a futile search for pristine pearls, but rather on understanding the social and cultural construction of communication, values, and social reality.¹⁴⁸

Besides explaining how we come to have a sense or value of justice, philosophical hermeneutics also helps us to understand our inexhaustible urge for justice — that is, the impatient movement of our sense of justice. As already stated, justice is a contested concept within our communal traditions. If truth keeps happening, as philosophical hermeneutics maintains, then the truth or meaning of justice keeps happening. The meaning of justice cannot be exhausted; it moves with our shifting horizons as we enter into ever-new contexts.¹⁴⁹ Moreover, our inexhaustible drive for justice is linked to the movement of tradition. As previously discussed, even our traditions are constantly being transformed. Traditions are neither fixed and precisely bounded entities nor are they passed on to individuals through some precise method or mechanical process. The boundaries of any tradition are always contested, always constituted and reconstituted, and this constant reconstitution always is simultaneously constructive and destructive. Thus, while the *concept* of a tradition helps us to grasp or understand the social construction of reality — our being-in-the-world — we should not attempt to reify or reduce any actual tradition (or even the concept of a

148. Balkin's turn to precultural human drives and values is especially surprising given that he apparently has accepted the postmodernist emphasis on culture and tradition in his other writings. For example, in another recent article, he notes:

A jurisprudence of the subject is above all a *cultural* jurisprudence, for it is culture that creates legal subjects as subjects. . . .

The beholder [or subject] is not fully in control of what she sees; she is part of a larger legal and political culture that shapes the very forms of her understanding. She does not choose the terms of her ideology or social construction. Rather she chooses through them; they form the framework within which her choices are understood and made.

Balkin, *Understanding*, *supra* note 36, at 108. Balkin's unexpected transition, however, is not unprecedented in critical theory. In a somewhat similar transformation, Max Horkheimer moved from a critique of ideology to a struggle for a "theological moment" in philosophy that emphasized a human longing to transcend reality. See DAVID HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 198 (1980).

149. Consequently, I would avoid *abstract and definitive* statements regarding the content of justice. For example, in many contexts, I would agree with Balkin's statement that "[t]he demand for an increase of justice is not necessarily the demand for increased responsibility. It is rather the demand for an appropriate apportionment of responsibility." Balkin, *supra* note 7, at 1150 (emphasis omitted). Nonetheless, I cannot accede to the decontextual thrust of his very next sentence: "*That* is what 'just' means — neither too much nor too little, but just the right amount of responsibility for each person." *Id.* (emphasis added).

tradition) into a single linguistic formulation or a fixed object.¹⁵⁰ Certainly, then, specific concepts such as justice, which are parts of our traditions, necessarily remain constantly in flux. The movement of tradition, in short, helps drive our insatiable urge for justice.

Although philosophical hermeneutics thus facilitates comprehension of our inexhaustible urge for justice, deconstruction more fully illuminates this urge. Translating our Gadamerian analysis into Derridean terms, we would say that any conception or meaning of justice is merely a signifier, not a stable signified. There is a continual play of justice: justice is never sufficiently present to halt the play of differences.¹⁵¹ Whereas Gadamer would consider the meaning of justice to be inexhaustible, Derrida would consider it undecidable. In any context, whenever we label an event or action as just, there is necessarily the trace of the Other hiding in the margins of our understanding. Within each hermeneutic act in which the meaning of justice comes into being, there is injustice. Each act of justice violently and duplicitously excludes, denies, and oppresses some Other.¹⁵² Hence, justice cannot be fulfilled; it is always displaced.¹⁵³

Balkin, then, mistakenly argues that Derridean deconstruction must be augmented in order to explain our inexhaustible drive for justice. Because of this mistake, he looks outside of deconstruction to the well-springs of the human soul. But deconstruction does not need to be augmented: the play of signifiers drives our sense of justice. As Christopher Norris declares, "deconstruction is always already at

150. See Adam Thurschwell, *Reading the Law*, in *THE RHETORIC OF LAW* 275, 312-17 (Austin Sarat & Thomas R. Kearns eds., 1994).

151. To a degree, my understanding of the relation between deconstruction and justice tends to merge Foucault with Derrida. Foucault tends to be oriented to the sociological and historical, while Derrida tends to be oriented to the philosophical. See ROY BOYNE, *FOUCAULT AND DERRIDA: THE OTHER SIDE OF REASON* 114 (1990); Hoy, *supra* note 3, at 58-62. Compare DERRIDA, *GRAMMATOLOGY*, *supra* note 3 with MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., 1977) and MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978). To me, justice is a sociological phenomenon, not merely a philosophical question.

152. The social theorist Niklas Luhmann, in articulating the autopoietic theory of law, explains that a legal system must have a binary code — justice versus injustice — and must exclude both contradictions — justice is injustice, or injustice is justice. See Niklas Luhmann, *Law as a Social System*, 83 Nw. U. L. Rev. 136, 140 (Shierry Weber Nicholsen trans.) (1989). From this viewpoint, then, one can easily understand why so many legal scholars consider deconstruction so threatening to a legal system. The concept of a legal system, at least as described by Luhmann, is destabilized by the deconstructive notion that justice always contains injustice.

153. Cf. Stanley Fish, *Play of Surfaces: Theory and the Law*, in *LEGAL HERME-NEUTICS: HISTORY, THEORY, AND PRACTICE*, *supra* note 39, at 297, 305-06 (observing that every horizon of understanding is itself an engine of change).

work."¹⁵⁴ Balkin's conception of the soul gives us nothing that, in our being-in-the-world, we do not already have — an insatiable urge for justice. Yet, in return for his transcendental effort, Balkin suffers a significant political cost. By positing the human soul as the source of our sense of and urge for justice, Balkin obscures a radical political point — that humans have a propensity to perpetrate at least as much injustice as justice. In fact, I could argue (but I will not) that human history — the Holocaust, slavery, the Inquisition, Jim Crow — demonstrates an inexhaustible drive for cruelty and indifference. In this light, Balkin's human soul appears just a bit too noble and cheerful.

Perhaps Balkin's modernist metaphysical twist, which induced him to separate sharply deconstruction from justice, led him to overlook the hermeneutic and sociological significance of deconstruction. Indeed, in *Force of Law*, Derrida stated that "[d]econstruction is justice."¹⁵⁵ While I would not absolutely equate deconstruction and justice, I do insist that they are inseparable — or that they *should* be so. In particular, the deconstructive focus on the Other ought to be a central aspect of justice. The insatiable drive to reveal violence and deception, to uncover denial, exclusion, and oppression, should remain at the forefront of justice. Instead of contemplating and pursuing an affirmative vision of justice, we should focus on what might be called *deconjustice* — an endless effort to eradicate *injustice*.¹⁵⁶ Consequently, I would modify Balkin's conception of the virtuous person. In Balkin's eyes:

To be just we must construct examples of justice using the indeterminate urge for justice as our goad rather than as our guide. This means that the virtuous person is not a good copyist but a good architect. She attempts to satisfy her sense of justice by *constructing* just institutions.¹⁵⁷

154. NORRIS, *supra* note 5, at 200 (emphasis omitted).

155. Derrida, *Law*, *supra* note 3, at 945 (emphasis added). Elsewhere, Derrida writes: "[D]econstructions have always represented, as I see it, the at least necessary condition for identifying and combating the totalitarian risk." Derrida, *Sound of the Sea*, *supra* note 119, at 647.

156. Cf. WHITE, *supra* note 116, at 122-23 (recommending reversal of the justice-injustice priority so that we focus on injustice); Allan C. Hutchinson, *Doing the Right Thing? Toward a Postmodern Politics*, 26 LAW & SOC. REV. 773 (1992) (noting that postmodernism is an effective theoretical resource for radical transformative politics); Thurschwell, *supra* note 150, at 330-32 (claiming that deconstruction is a call to absolute justice, to uncover the violence of law). Drucilla Cornell states:

[T]he entire project of the philosophy of the limit [or deconstruction] is driven by an ethical desire to enact the ethical relation. Again, by the ethical relation I mean to indicate the aspiration to a nonviolent relationship to the Other, and to otherness more generally, that assumes responsibility to guard the Other against the appropriation that would deny her difference and singularity.

DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* 62 (1992).

157. Balkin, *supra* note 7, at 1141 (emphasis added).

To me, the virtuous person focuses less on the construction of just institutions than on the deconstruction of unjust ones. The virtuous person, in other words, primarily pursues deconjustice, for the diminution of injustice will produce increasingly just institutions.¹⁵⁸

Ultimately, however, the intimate connection of deconstruction and justice ends in paradox, not in a determinate relation.¹⁵⁹ Deconstruction underscores that the Other always lies in the margin — some individuals and groups always are excluded and denied. Thus, deconstruction challenges us to justify this violence and oppression or to change. Yet even if we change, we do not eradicate the Other; some outgroup always exists. But not all outgroups or Others are the same. We should not necessarily surrender to some social group merely because it has been oppressed as the Other. Some groups should be oppressed, while others should not be.¹⁶⁰ Neo-Nazis, for example, should be oppressed, but Democrats should not. And in some instances, being open to and inclusive of some former outgroup risks the suppression of oneself. Even more perplexing, when we seek to open to an outgroup, we risk imposing a different form of subjugation. Instead of ignoring or silencing the outgroup, we might colonize it by appropriating and altering its message and by urging its members to assimilate into the dominant group.¹⁶¹ At any rate, these paradoxes mean only that deconstruction does not produce determinate results. But one should not have expected otherwise. Postmodern interpretivism neither promises nor provides foundations, yet it nonetheless remains markedly political.

158. Before anyone started talking about deconstruction, Edmond N. Cahn wrote that justice "means the active process of remedying or preventing what would arouse the sense of injustice." EDMOND N. CAHN, *THE SENSE OF INJUSTICE* 13-14 (1949) (emphasis omitted). Cahn, however, considers this sense of injustice to be a natural capacity or predisposition of the human animal. See *id.* at 24-25. In this regard, then, Cahn's argument resembles Balkin's emphasis on the wellsprings of the human soul.

159. Cf. Feldman, *Diagnosing Power*, *supra* note 5, at 1082-83 (noting that postmodernism revels in paradoxes).

160. I agree with Balkin on this point. See Balkin, *supra* note 7, at 1162-64; accord WHITE, *supra* note 116, at 125-42. As Balkin observes: "Justice, it seems, does not always demand that one speak in the language of the Other, especially when the Other is not playing by the same rules." Balkin, *supra* note 7, at 1164.

161. In the words of Stephen K. White:

The delight with the appearance of the other brings with it the urge to draw it closer. But that urge must realize its limits, beyond which the drawing nearer becomes a gesture of grasping. And that realization will be palpable only when we are sensitive to the appearance of the particular other as testimony of finitude. Then delight will be paired with a sense of grief or mourning at the fragility and momentary quality of the appearance of the other.

WHITE, *supra* note 116, at 90.

CONCLUSION

Dennis Patterson worries about an infinite regress of interpretations. J.M. Balkin worries about our inexhaustible urge to justice. Neither need worry. Postmodern interpretivism is a social reality. We do not get the opportunity to accept or reject it: postmodern interpretivism is our being-in-the-world. Philosophical hermeneutics explains how we come to understand a text without falling into an infinite regress, and hermeneutics and deconstruction explain how we constantly pursue justice even as it always eludes our grasp.

Yet, *theorizing* can matter. The articulation and advocacy of a theory of postmodern interpretivism might have some political valence. In particular, theories of philosophical hermeneutics and deconstruction can help us to stop worrying about relativism, solipsism, and nihilism; interpretivist theories can turn our attention away from these modernist hobgoblins and toward social issues instead. Thus, to Patterson, partly because he rejects postmodern interpretivism, the task of jurisprudence is still largely descriptive and analytical — and therefore conservative. But to me, the task of jurisprudence is first and foremost critical — to uncover the denial and exclusion of the Other within the law.

At the same time, I do not wish to overstate the political significance of this article. While I find it personally rewarding to make a political statement (as I do here), I am not deluded enough to believe that I am changing the world in some significant and immediate fashion. Nobody is going to run out tomorrow to restructure economic relations in American society because I have argued that understanding is interpretation. More specifically, I do not believe that this article even can influence Patterson. He appears so strongly committed to his professional identity as a certain type of Wittgensteinian pragmatist that he is unlikely to consider seriously any alternative positions. Balkin, however, might be another story. I hope that his case of postmodern vertigo was only temporary. For several years, Balkin has been one of the few legal writers willing to explore postmodern issues such as the social construction of reality, the role of ideology, and the problem of social critique.¹⁶² Losing him to some updated form of modernism would be a shame. Perhaps he will soon return to his *postmodern self*. The *self*, though, is such a modernist concept, but then again, vestiges of modernism always seem to be lying in the margins of postmodernism — like a soul in deconstruction?

162. See, e.g., J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); J.M. Balkin, *What Is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992); J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991) (book review).